SUPREME COURT OF VICTORIA
COURT OF APPEAL

S EAPCR 2023 0171

GEORGE VARGHESE Applicant

v

THE KING Respondent

JUDGES:	KENNEDY and T FORREST JJA
WHERE HELD:	Melbourne
DATE OF HEARING:	7 May 2024
DATE OF JUDGMENT:	30 May 2024
MEDIUM NEUTRAL CITATION:	[2024] VSCA 115
JUDGMENT APPEALED FROM:	*DPP v Varghese* [2023] VCC 1570 (Judge Wilmoth)

CRIMINAL LAW – Appeal – Sentence – Fail to render assistance after motor vehicle accident – Fail to stop after such accident – Obtain financial advantage by deception ('OFAD') – Attempted OFAD – Failure of a vehicle owner to provide information – Applicant collided with pedestrian who passed away following collision, did not stop to assist deceased, and made insurance claim without disclosing circumstances of collision – Applicant pleaded guilty to failing to render assistance after motor vehicle accident, failing to stop after such accident, OFAD, attempted OFAD and related summary offence of failure of vehicle owner to provide information – Sentenced to 12 months' imprisonment plus a 3-year Community Correction Order ('CCO') – Victim impact statements – Whether judge erred by taking into account impact of death on loved ones where no allegation of negligent driving – Whether judge erred in imposing individual sentences of imprisonment and aggregated CCO sentence – Whether sentences on charges 3, 4 and related summary offence manifestly excessive – Judge impermissibly took into account impact of death on loved ones – Appeal allowed – Resentenced to 10 months' imprisonment with a fine of $1,300.

Road Safety Act 1986, ss 60, 61(1)(b) and 61(3); *Crimes Act 1958*, ss 321M and 82(1); *Sentencing Act 1991*, ss 5(2)(daa), 5(2)(db), 8K(1), 8L.

Bankal v The Queen [2019] VSCA 171; *R v Harding* (2008) 50 MVR 413; *Stewart v The Queen* (2018) 83 MVR 535; *Vasilevski v The Queen* (2018) 83 MVR 35; *Sarikaya v The Queen* (2015) 73 MVR 1; *Wassef v The Queen* [2011] VSCA 30; *Maher v The Queen* (2017) 83 MVR 224; *Azzopardi v The Queen* (2017) 82 MVR 119; *Tokay v The Queen* (2014) 69

MVR 24; *Simpson v The Queen* (2015) 72 MVR 147; *Nguyen v The Queen* [2014] VSCA 53; *Neskovski v The Queen* [2022] VSCA 86; *DPP (Vic) v Dalgliesh (a pseudonym)* [2017] HCA 41; *Barbaro v The Queen* [2012] VSCA 288; *Lane v The Queen* [2017] VSCA 289; *Guden v The Queen* (2010) 28 VR 288; *Loftus v The Queen* [2019] VSCA 24; *Hague v The Queen* (2002) 98 MVR 503; discussed; *York (a pseudonym) v The Queen* [2014] VSCA 224 considered; *DPP v Chhatre* (2014) 69 MVR 1; *Berichon v The Queen* (2013) 40 VR 490 applied.

Counsel

Applicant:	Mr D Dann KC with Ms C Boston SC
Respondent:	Ms E Ramsay

Solicitors

Applicant:	Mr L Karakas, Melasecca, Kelly & Zayler
Respondent:	Ms A Hogan, Solicitor for Public Prosecutions

KENNEDY JA
T FORREST JA:

1 On 21 August 2023, the applicant pleaded guilty to failing to render assistance after a motor vehicle accident, failing to stop after that accident, obtaining a financial advantage by deception ('OFAD'), attempting to OFAD, and the related summary offence of failure of a vehicle owner to provide information.

2 The applicant was sentenced to a total effective sentence of 12 months' imprisonment and a 3-year Community Correction Order ('CCO').[1] The details of the sentence imposed are set out in the table below.

Charge on Indictment	**Offence**	**Max Penalty**	**Sentence**
1	Fail to render assistance after a motor vehicle accident (driver knew or ought reasonably to have known that the accident had occurred and had resulted in a person being killed or suffering serious injury)[2]	10 years' imprisonment	12 months' imprisonment and a 3-year CCO
2	Fail to stop after a motor vehicle accident (driver knew or ought reasonably to have known that the accident had occurred and had resulted in a person being killed or suffering serious injury)[3]	10 years' imprisonment	12 months' imprisonment and a 3-year CCO
3	OFAD[4]	10 years' imprisonment	12 months' imprisonment and a 3-year CCO
4	Attempt to OFAD[5]	5 years' imprisonment	6 months' imprisonment and a 3-year CCO
Related Summary Offence	Failure of owner of motor vehicle to give information about driver[6]	4 months' imprisonment and/or 20 penalty units	1 month's imprisonment and a 3-year CCO
Total Effective Sentence:		12 months' imprisonment and a 3-	

1 *DPP v Varghese* [2023] VCC 1570 ('Reasons').
2 Contrary to ss 61(1)(b) and 61(3) of the *Road Safety Act 1986*.
3 Contrary to ss 61(1)(a) and 61(3) of the *Road Safety Act 1986*.
4 Contrary to s 82(1) of the *Crimes Act 1958*.
5 Contrary to ss 321M and 82(1) of the *Crimes Act 1958*.
6 Contrary to s 60 of the *Road Safety Act 1986*.

	year CCO
Pre-sentence Detention Declared:	Nil.
Section 6AAA Statement:	3 years' imprisonment with a non-parole period of 2 years
Other orders	Driver's licence cancelled for 4 years.

3

4 In this application for leave to appeal against sentence, the applicant proposes three grounds of appeal.

> Ground 1:
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> The learned sentencing judge erred in taking into account the impact of Mr Pierce's death on his loved ones.
>
> Ground 2:
>
> The learned sentencing judge erred in imposing both:
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> (i) individual sentences of imprisonment; and
>
> (ii) an aggregate sentence (namely a [CCO]),
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> on the same charges.
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> Ground 3:
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> The individual sentences imposed on Charges 3 and 4 and on the related summary offence are manifestly excessive in all the circumstances of the case, including the applicant's very early guilty pleas, lack of criminal history, and stress regarding his potential deportation.

5 We have determined that sentencing error under proposed ground 1 has been established. The applicant's sentence will be set aside and the applicant will be resentenced to a total effective sentence of 10 months' imprisonment. We shall explain our reasons for this course.

Factual circumstances

6 It is convenient to quote, where relevant, from the Amended Summary of Prosecution Opening tendered as an exhibit on the plea.

> The Offender in this matter is George Varghese ('**Varghese'**). At the time of the collision, he was aged 31 years old and resided with his wife in Narre Warren. He is currently aged 32 years old. Mr Varghese was born in India and is in Australia on a partner visa. Mr Varghese was employed as an accountant

for the Australian Catholic University and worked predominantly from home at the time of the offending.

At the time of the collision, Mr Varghese was driving a 2017 black BMW 420i sedan bearing Victorian registration plates, […], registered in his name ("**BMW vehicle**"). Mr Varghese was the holder of a full and current Victorian Driver Licence.

The Victim, Darrin Pierce ("**Pierce**"), was aged 44 years old at the time of the collision and was the owner and operator of a small business. He resided a short distance from the collision scene with his wife and three children.

CIRCUMSTANCES OF THE OFFENDING

At approximately 12.09AM on Saturday, 26 November 2022, the Offender, Mr Varghese, was driving his BMW vehicle in a northwest direction on Princes Highway, Berwick.

At around the same time, Mr Pierce was walking southeast along the southern edge of the first northwest bound lane of Princes Highway, contraflow to the traffic driving northwest.

Mr Varghese was travelling in the left lane when he struck Mr Pierce with his BMW vehicle, approximately 400 metres north-west of the intersection with Bryn Mawr Boulevard. The front passenger corner of Mr Varghese's vehicle struck Mr Pierce whilst he was walking or standing upright and facing Mr Varghese's vehicle.

As a result of the collision, Mr Pierce was thrown approximately 25 metres and sustained life-threatening injuries. He died at The Alfred Hospital later that morning.

Mr Varghese did not stop to assist Mr Pierce following the collision and did not contact emergency services or report the collision shortly afterwards, or in the following days.

The collision scene

Princes Highway is a four-lane bitumen road, running predominantly

northwest-southeast, with two lanes in each direction. At the point of the collision, the northwest-southwest lanes were separated by solid double white lines. The road was bordered on both sides by solid white fog lines. The southern border extended to a narrow grass verge and a spoon drain that ran parallel to the roadway. The drain led to a wide grassed shoulder containing a footpath and intermittent mature trees. The northern border had a limited gravel shoulder that led to a grass nature strip and service road.

The collision scene on Princes Highway was not lit by streetlights. There are intermittent streetlights located on the service road to the north of the collision scene.

The speed limit in the section of Princes Highway where the collision occurred was a signposted 70 km per hour zone.

At the time of the collision, it was night-time. The weather was clear and the road was dark and dry.

The circumstances of the collision Earlier in afternoon of Friday, 25 November 2022, Mr Pierce had attended a local football presentation event in Dandenong. Mr Pierce consumed alcohol at that event and then later attended Bar EightyOne located on Princes Highway in Berwick where he consumed further alcohol.

Mr PIERCE encouraged his wife, Tidarat (Kati) Yaworn ("**Yaworn**"), to join him at Bar EightyOne at approximately 10.00PM. Ms Yaworn attended soon afterwards.

At approximately 11.40PM, Mr Pierce and Ms Yaworn left Bar EightyOne. They were smiling and holding hands and headed in a westerly direction. Some minutes later, Ms Yaworn was observed to be walking on the footpath in a southeast direction from Bar EightyOne and was followed by Mr Pierce approximately 20 seconds later. At that time, Mr Pierce appeared to be smiling and holding a takeaway coffee cup.

At that time, Mr Pierce was observed by witnesses to appear intoxicated but to have good balance and coordination.

Upon leaving Bar EightyOne, Ms Yaworn and Mr Pierce proceeded to cross over Princes Highway in front of Bar EightyOne at the Wheeler Street roundabout, to the southern side of the road and continued in a southeast direction towards their home.

As they walked in the southeast direction, Ms Yaworn walked on the footpath and Mr Pierce walked on the road in the left lane of the northwest bound lanes in the direction of oncoming traffic. During that time, Ms Yaworn was of the belief that Mr Pierce was walking behind her as she could hear him talking.

A witness travelling in an oncoming vehicle in the right northwest bound lane observed Mr Pierce walking on the road in the left northwest bound lane and talking on his mobile telephone. Mr Pierce was not well illuminated, even for the driver in the right northwest bound lane, who was only able to see him as she drove past him. Another vehicle travelling in the same direction but in the left northwest bound lane swerved around Mr Pierce, narrowly missing a collision with him.

At this time, Ms Yaworn, who had dispensed with her high heels and was walking at a faster pace, could hear the sound of car horns but did not think at the time that they related to Mr Pierce as she believed he was walking behind her on the footpath.

When Ms Yaworn had reached her home address she saw that Mr Pierce's son was on the telephone. He informed her that Mr Pierce had been in an accident. Ms Yaworn then returned to the collision scene.

Earlier on the evening of 25 November 2022, the Offender, Mr Varghese, had made an arrangement to meet up with an acquaintance shortly after midnight that evening.

At approximately 12.00AM on 26 November 2022, Mr Varghese, driving his BMW vehicle, departed from his home address in a south easterly direction towards the meeting location. As he was driving, Mr Varghese received an SMS message indicating that the meeting location changed to Noble Park.

At 12.08AM, Mr Varghese changed the direction he was travelling in to drive

his BMW vehicle towards Noble Park.

At 12.09AM, Mr Varghese drove towards the collision location and collided with Mr Pierce with his BMW vehicle.

Following the collision, Mr Varghese continued driving his BMW vehicle towards the Noble Park meeting location. (***Charge 1: Accident – Fail to Assist – Death; Charge 2: Accident – Fail to Stop – Death***)

At 12.13AM, an Uber driver with two passengers was passing through the collision location and noticed a man laying on the side of the road. He […] noticed car parts on the road. He also noticed the area was dark. He did a U-turn and stopped his car near Mr Pierce and turned the car's hazard lights on. One of the passengers in the Uber called the emergency services. Mr Pierce was observed to move his head and his body slightly and to have obvious and significant injuries to his lower left leg and was heard to make grunting and groaning sounds. Further passers-by stopped their vehicles to assist, including telephoning Ms Yaworn. Ms Yaworn arrived at the scene, as well as the son of Mr Pierce.

…

The collision investigation

At approximately 2.39AM on 26 November 2022, members of the Victoria Police Major Collision Investigation Unit ("**MCIU**") attended the collision scene. Members of the Victoria Police Collision Reconstructionist Unit also attended the collision scene around the same time and commenced their reconstruction of the collision. The weather was observed to be clear, the road dry and there was low light on the road.

…

[The MCIU concluded] that there were no braking tyre marks from the vehicle in the collision. It […] also opined that at impact the pedestrian, Mr Pierce, was located on the bitumen road surface inside the fog line, approximately 0.38 metres to 0.5 metres from the bitumen edge. Mr Pierce was thrown approximately 25 metres from the area of impact with the BMW vehicle.

…

FURTHER INVESTIGATION AND ARREST

Location and analysis of BMW vehicle and interview

…

On Saturday 3 December 2022 at approximately 9.40AM, Victoria Police MCIU investigators attended Mr Varghese's address in Narre Warren. Upon their arrival, they located a 2017 black BMW 420 vehicle, bearing registration plates […]. The investigators observed damage to the vehicle consistent with the collision in relation to Mr Pierce, including that the vehicle was missing a passenger side wing mirror.

The MCIU investigators commenced an application for a search warrant pursuant to s. 465 of the *Crimes Act 1958* (Vic) for the seizure of the BMW vehicle and search of Mr Varghese's property. At approximately 10.45AM, Mr Varghese returned to the address in a grey 2020 Kia Cerato sedan, bearing registration […](“**Kia Cerato vehicle**”).

Mr Varghese was subsequently arrested by MCIU investigators and provided with a caution and his rights. When asked how his BMW vehicle came to be damaged, Mr Varghese stated *“A branch fell off”*. When asked where that had occurred, Mr Varghese stated *“Here. And I have another car. It touched it. I mean just, hit on it. And it hit the tree.”* (***Summary charge 3: Owner fail to provide information***)

Mr Varghese was then transported to Narre Warren Police Station where he participated in a taped record of interview at approximately 11.38AM. During the interview, Mr Varghese stated 'no comment' to a number of questions about the collision and damage to his BMW vehicle. He did, however, state the following:

- On Tuesday 29 November 2022 at 1PM, he was in his driveway and he mistakenly accelerated his car instead of braked and his BMW vehicle hit another car in his driveway and then hit a branch that had fallen from a tree (Q&A 42 – 44). The other car was his mother in law's car (Q&A 106).

- As a result, the left front bumper, middle window and left mirror were damaged (Q&A 48 – 51).
- He called Vero Insurance and reported the incident (Q&A 53 – 54).
- He did not know from which tree the branch came down from… it was really windy and it was when it fell off the tree onto the windscreen he panicked and accelerated instead of braked (Q&A 112 – 115).
- After he hit the tree, he had a lot of work on that day and had a meeting at 2PM so he continued working and when he got some free time he called the insurance company, Vero Insurance, and told them what had happened (Q&A 115 – 121, 141).
- He had no idea why the damage to his car is consistent with debris and car parts that were left at the scene of the collision (Q&A 313).

Following the taped record of interview, Mr Varghese was charged in relation to the collision with Mr Pierce.

…

Inquiries with insurance companyMCIU investigators undertook inquiries with Vero Insurance parent company, Suncorp, in relation to the circumstances surrounding the hire of the Kia Cerato vehicle by Mr Varghese.

It was subsequently revealed that on Tuesday, 29 November 2022 at 2.17PM, Mr Varghese contacted Vero Insurance Claim Centre and falsely stated that he had damaged his BMW vehicle by accidentally hitting the accelerator instead of the brake, causing the vehicle to hit his mother in law's car and then hit a tree in his driveway. He further stated that his left mirror was gone and there was a scratch on the left-hand door and the front bumper. He stated that there were notifications that the car had malfunctions and he did not think he should be driving it.

A claim was generated and Mr Varghese was provided with a replacement vehicle, the Kia Cerato vehicle, from Hertz Australia on the same day. Mr Varghese paid the $1,000 excess as part of his insurance claim. (***Charge 3: Obtaining a Financial Advantage by Deception***).

Also in the call made by Mr Varghese to Vero Insurance on 29 November 2022, Mr Varghese attempted to organise for the tow and repair of his BMW vehicle, based on the false circumstances that he had provided about how the BMW vehicle came to be damaged. The BMW vehicle was never towed nor

repaired in connection with the claim made to Vero Insurance by Mr Varghese. (***Charge 4: Attempt to Obtain a Financial Advantage by Deception***).

On 5 December 2022 at 9.33AM, Mr Varghese contacted Vero Insurance Claim Centre and requested that his insurance claim be cancelled and indicated that he would meet the incurred costs for the replacement Kia Cerato vehicle from Hertz Australia.

7 Further evidence from the depositions and relied upon at the plea hearing was to the following effect.

> A witness travelling in an oncoming vehicle in the right northwest bound lane observed a male walking on the road in the left northwest bound lane and talking on his mobile telephone. The male was not well illuminated, even for the driver in the right northwest bound lane, who was only able to see him as she drove past him;
>
> Another witness was driving and passed a man walking on the road in the opposite direction. She states, 'my first reaction was, this guy is going to get hit. We nearly hit him. If it wasn't for a car coming the other way lighting him up, [I] would have hit him. I missed him by an inch;
>
> At 12:07 am, the deceased sent a text message to his partner, it read, 'I'm going to kill myself' (the '*text message*').

8 It will be recalled that the accident happened at approximately 12:09 am.

The plea hearing

9 The applicant was represented by experienced counsel who made a comprehensive plea. He submitted that there was no suggestion that the accident and therefore the cause of death was caused by the manner of the accused's driving, nor was it suggested that alcohol or any other substance played any part in these tragic events. This submission was undisputed on the plea.

10 The applicant, who was 31 at the time of the offending, was born in Kerala, a state in India. His father is a priest in the Syrian Orthodox Church and his mother, a teacher. Both are resident in India. He has one sister who is living in Australia on a student visa. The applicant completed a graduate degree in accounting and then came to Australia in 2016 to complete a masters degree in proficient accounting. He initially held a casual position at Epworth Health Care in the accounts department and then became employed by the Catholic Education Authority in Melbourne after completing his masters degree.

11 The applicant married in 2019. His wife, Angel, who came to this country in 2006, completed her medical degree at Monash University in 2020 and is a junior doctor applying for the General Practitioners' Program. The couple purchased a home in 2022 and plan to start a family in the near future.

12 The applicant has applied for a partner visa and, if granted, would get temporary residency, and over time, permanent residency. At the time of the plea, that application was on hold.

13 The applicant suffers from severe disruptive sleep apnoea and uses a continuous positive airway pressure machine every night.

14 He has symptoms consistent with panic disorder and adjustment disorder with both anxiety and mood symptoms. He has emerging symptoms of major depressive disorder and post-traumatic stress disorder for which he is being treated by a psychologist and for which he takes metazepan. At the plea, defence counsel noted that the applicant was 'not he same person he once was', losing interest in hobbies, socially isolating, feeling uneasy and stressed, and startling easily when travelling in motor vehicles. He has been known to be found screaming and sobbing uncontrollably in the middle of the night as a result of nightmares.

15 He is heavily involved in church and charitable activities, has no prior convictions, no history of alcohol or drug problems and an exemplary prior driving record.

16 On the issue of objective seriousness, defence counsel emphasised:

- He bore no criminal responsibility for causing the death.
- The roadway where the collision occurred was not lit by streetlights.
- He travelled under the designated speed limit.
- There were no braking tyre marks from the vehicle in the collision.
- Others were present who rendered assistance.
- A witness who drove past the deceased just prior to the applicant 'nearly hit' the deceased. She 'missed by an inch'.
- The deceased sent his partner the text message at 12:07 pm.
- There is no suggestion that the offending was motivated by any attempt to avoid detection because of the nature of the driving, intoxication or prior driving record.
- In the dark, the deceased was struck in a 'sideswipe type impact', compared to for example a case of forceful impact where the driver sees a person 'fly over' the vehicle.
- The applicant did not actually know at the time of impact that the accident resulted in a person's death.

17 The applicant's plea was entered at the earliest possible opportunity. This bears upon both remorse and the utilitarian value of the plea. An apology was tendered on the plea.

18 The applicant has excellent prospects of rehabilitation having regard to his stable background circumstances, education and work history, prospects of a family in the foreseeable future, family and community support, attendance at therapy and motivation to continue such attendance, attendance at a road trauma awareness seminar, and the content of his references.

19 Counsel for the applicant referred to the case of *Bankal v The Queen*[7] and incorporated in his written submissions a summary of similar cases.[8] He contended that the most similar case

7 [2019] VSCA 171.

8 *Stewart v The Queen* (2018) 83 MVR 535; [2018] VSCA 55; *Vasilevski v The Queen* (2018) 83 MVR 351; [2018] VSCA 7; *Sarikaya v The Queen* (2015) 73 MVR 1; [2015] VSCA 236; *Wassef v The*

factually was *DPP v Chhatre* and that there was a 'palpable distinction as far as moral culpability was concerned',[9] between *Chhatre* and other examples of this type of offending.

20 It was submitted that a CCO was an appropriate non-custodial disposition.

21 A report from the applicant's treating clinical psychologist was tendered. The applicant had been referred to Ms Barbara Lach by his general practitioner. She had treated him on several occasions in 2023. Her opinion is set out at para [46] of these reasons.

22 A medical opinion confirming the applicant's sleep apnoea authored by Dr Michael Pallin, sleep and respiratory physician, was tendered into evidence.

23 Letters of support and character references were tendered from the applicant's wife, father, sister, cousin, cousin's wife's aunt, a colleague and a family friend. They spoke of his otherwise good character, fundamental decency and remorse.

24 The prosecutor also made written and oral submissions. It was submitted that a head sentence with a non-parole period was the only available sentence in this case. The prosecutor submitted:

> A motor vehicle collision where a death or serious injury has resulted is inherently serious. The failure of a driver to immediately stop and the failure to immediately render assistance to a person killed or having suffered a serious injury involves '*very serious criminal conduct in a field of human activity, which is of abiding concern to the community*'.[10]

25 The prosecutor emphasised general deterrence, just punishment and denunciation as important sentencing considerations, noting that specific deterrence and community protection may have lesser relevance having regard to the circumstances of the offending and the applicant's prior good character.

26 The prosecutor submitted that the court must have regard (pursuant to s 5(2)(a) of the *Sentencing Act 1991*) to the maximum penalties for the offending prescribed by the legislation; the maximum penalty for charges 1 and 2 is 10 years' imprisonment. The prosecutor noted that the maximum penalties for charges 1 and 2 were increased in 2005 from 2 years to 10 years which reflects the seriousness with which Parliament views this offending and the intention that general deterrence be given significant weight in the exercise of the sentencing discretion.[11] It was said that the maximum for charge 3 (10 years) and charge 4 (5 years) also demonstrate the seriousness with which this offending is viewed by Parliament. The maximum penalty for the related summary offence is 4 months' imprisonment.

27 It was submitted that this was a serious example of each of charges 1 and 2 and that the following matters were relevant to assessing the objective gravity of the offending:

(1) The collision occurred at night-time. The weather was clear and

Queen [2011] VSCA 30; *Maher v The Queen* (2017) 83 MVR 224; [2017] VSCA 381; *Azzopardi v The Queen* (2017) 82 MVR 119; [2017] VSCA 299; *Tokay v The Queen* (2014) 69 MVR 24; [2014] VSCA 285; *Simpson v The Queen* (2015) 72 MVR 147; [2015] VSCA 210; *Nguyen v The Queen* [2014] VSCA 53; *DPP v Chhatre* (2014) 69 MVR 1; [2014] VSCA 280 ('*Chhatre*').

9 (2014) 69 MVR 1; [2014] VSCA 280.

10 *Neskovski v The Queen* [2022] VSCA 86, [29] (emphasis in original).

11 Citing *Road Safety (Further Amendment) Act 2005* s 5(1), *Vasilevski v The Queen* (2018) 83 MVR 351, 363 [47]; [2018] VSCA 7; *Tokay v The Queen* (2014) 69 MVR 24, 31 [26]; [2014] VSCA 285.

the road was dry.

(2) The road the subject of the collision was relatively straight with minimal traffic.

(3) The location where the collision occurred was sparse and clear of obstructions that could have crowded the surrounding area making visibility difficult.

(4) Mr Pierce was hit by the front passenger corner of Mr Varghese's BMW vehicle whilst Mr Pierce was standing upright and facing Mr Varghese's vehicle. The impact severely damaged Mr Varghese's vehicle including the front passenger side wing mirror which was removed.

(5) Based on the impact location and damage to the vehicle, Mr Varghese would have been aware that the vehicle he was driving had been involved in a significant collision, and that he could have collided with a pedestrian.

(6) Following the impact, Mr VARGHESE continued to drive from the collision location and maintained a pre-arranged meeting.

(7) In relation to the failure to assist, at no time did Mr Varghese provide any assistance to Mr Pierce in these circumstances.

(8) In relation to the failure to stop, at no time until police detection over one week later did Mr Varghese inform authorities of the collision. There is no conduct on the part of Mr Varghese that demonstrates that he was ever going to be forthcoming with what had occurred.

28 The prosecutor stated:

> There is no allegation of any dangerousness or carelessness in connection with the driving of Mr Varghese that has resulted in the death of Mr Pierce. There is also no assertion that Mr Varghese's conduct is explained by a concern as to the risk of prosecution as a result of consumption of alcohol or drugs; the attempted avoidance of that risk which would usually significantly increase the culpability for the offending.[12]

29 The prosecutor noted that the obligation to immediately stop and immediately render assistance following an accident is not abrogated in the circumstances that others are present who may render assistance to the victim.[13]

30 In relation to the OFAD and attempted OFAD charges, the following matters were said to be relevant to assessing the objective gravity of that offending:

12 Citing *R v Harding* (2008) 50 MVR 413, 420 [29] (Lasry AJA, Ashley JA agreeing at 413 [1] and Dodds-Streeton JA agreeing at 414 [2]); [2008] VSCA 124.

13 Citing *Sarikaya v The Queen* (2015) 73 MVR 1, 12 [40] (Maxwell P and Kaye JA); [2015] VSCA 236.

- The relevant misconduct for both offences occurred in one telephone call.
- The financial advantage obtained was not substantial, nor was the amount involved in the attempt charge.
- The deception concealed a very serious incident that had occurred in an effort to continue to hide his involvement in the collision.

31 The prosecutor submitted the applicant's moral culpability was high in relation to all charges. It must have been obvious to him that a collision had occurred and there was no explanation on the evidence that he was not aware his car had been damaged or that he believed that he had hit something that would require him to stop and assist. His actions in continuing on, maintaining his pre-arranged meeting, deliberate omission to adhere to his duty over the following period and attempting to conceal his involvement 'compound his culpability'. In this, the prosecutor noted that a case where there has been deliberate steps to conceal involvement in an accident has been described as a case which is taken out of the category of cases which involve flight actuated by a moment of panic, and that the applicant's actions in the present case negated any inference of panic.[14] The applicant 'had no regard for the welfare of the person he struck, his state of mind to avoid the consequences of his actions'. Further, in respect of the OFAD and attempted OFAD offending, the prosecutor submitted that the applicant's actions in relation to his insurer and the obtaining of the replacement vehicle and attempted tow and repair were based on a 'conscious concoction of circumstances in which the damage was done to his vehicle' and while the amount obtained is not significant, the circumstances surrounding the deception were 'very serious'. Ultimately, the prosecutor submitted that the offending in this case 'falls towards the higher end of the spectrum of the seriousness of this offence'.

32 The prosecution tendered Victim Impact Statements ('VIS') from the deceased's wife (which included a letter in support from her psychologist), ex-wife, daughter, and his brother which, the prosecutor said made clear the 'substantial impact the death of Mr Pierce has had on all of them and also the lasting legacy of his death on their lives'. In written submission, the prosecutor submitted:

> There is a Victim Impact Statement from Ms Tidarat (Kati) Yaworn, the wife of Mr Pierce. Ms Yaworn describes the huge emotional and psychological impact of the loss of Mr Pierce as support to her in circumstances where she is not originally from Australia. She describes the collision site being close to their home and being reminded of the collision constantly and how her financial future is uncertain. Photographs attached to her VIS show Mr Pierce on happy occasions with his family.
>
> There is also a VIS from Andrew Pierce, Mr Pierce's brother. Mr Andrew Pierce reflects on his relationship with Mr Pierce and how much his absence is felt by himself and his family. Mr Andrew Pierce also speaks of the anguish and disbelief associated with waiting for the driver to hand himself into police following the collision, concerned that his brother was treated like *"roadkill"*.

33 In respect of current sentencing practices, the prosecutor submitted that the Court is not

[14] Citing *Sarikaya v The Queen* (2015) 73 MVR 1, 10 [31] (Maxwell P and Kaye JA); [2015] VSCA 236.

constrained by current sentencing practices,[15] noted that the comparative sentences provided by the defence were agreed and annexed a further comparative case to the Crown's written submissions.[16]

34 The prosecutor accepted the following in relation to the circumstances of the applicant:

- He pleaded guilty at an early opportunity though the resulting utilitarian benefit should be viewed in the context of a strong prosecution case. Remorse did not automatically follow.[17]
- He is to be sentenced as a person of prior good character. Specific deterrence and community protection may have lesser relevance.
- He has good prospects for rehabilitation though the psychological report arguably shows a self-reported minimisation of his conduct and this should be considered when assessing his prospects for rehabilitation.
- While the psychological report notes that he presents with symptoms consistent with a number of diagnoses, the applicant has not been formally diagnosed with any mood disorder, anxiety-related disorder or adjustment disorder and accordingly the symptoms can only be taken into account in relation to his personal circumstances.
- There is no indication that his mental state at the time of the offending was impaired or affected by any mental disorder.
- There is no reliance on any of the *Verdins* principles.[18]
- The apology letter appears an authentic expression of remorse, however it does not displace the need for the gravity of the offending to be reflected in the overall sentence.[19]
- The plea entered during the pandemic period carries with it enhanced utilitarian value. COVID-19 strictures in custody will add to the burden of imprisonment.[20]

35 Under the heading 'Deportation' the prosecutor submitted:[21]

> Mr Varghese is not an Australian citizen.
>
> The Crown accepts that if Mr Varghese were to receive a term of imprisonment greater than 12 months, the *Migration Act 1948* (Cth) provides that the Minister must cancel his visa. This decision may also be revoked.[22]

15 Citing *DPP (Vic) v Dalgliesh (a pseudonym)* (2017) 262 CLR 428 453–5 [81]–[85] (Gageler and Gordon JJ); [2017] HCA 41.

16 *Neskovski v The Queen* (2022) 100 MVR 12; [2022] VSCA 86.

17 Citing *Barbaro v The Queen* (2012) 226 A Crim R 354, [38] (Maxwell P, Harper JA and T Forrest AJA); [2012] VSCA 288.

18 *R v Verdins* (2007) 16 VR 269; [2007] VSCA 102.

19 Citing *Lane v The Queen* [2017] VSCA 289, [42] (Ferguson CJ and Maxwell P).

20 Citing *Worboyes v The Queen* (2021) 96 MVR 344; [2021] VSCA 169.

21 Emphasis added.

22 *Migration Act 1958* (Cth) s. 501CA.

36 Regrettably, this incorrectly states the effect of ss 501(3A) and 501(7) of the *Migration Act 1948* (Cth). The obligation on the Minister to cancel the visa of person in Mr Varghese's position would arise if the sentence of imprisonment was for a term of 12 months or more. This error may have assumed some significance in the sentence imposed.

37 The prosecutor further submitted that the prospect that an offender may be deported is relevant to two aspects of the sentencing calculus:

(a) The period of imprisonment may be more onerous for the offender due to the prospect of deportation at the end of serving their sentence; and

(b) If the offender is ultimately deported, the offender will lose the opportunity to permanently settle in Australia. This constitutes additional non-curial punishment.[23]

38 In concluding the Crown submissions in respect of deportation, the prosecutor noted the following obiter from the decision this Court in *Loftus v The Queen*: 'it would be an error for the sentencing judge to impose a sentence, that would otherwise not be appropriate, for the purpose of avoiding the operation of the Migration Act'.[24] Ultimately, the prosecution accepted that there is the prospect of deportation and that the burden of imprisonment may be more burdensome on the applicant given his ties to Australia.

The judge's reasons for sentence

39 The judge summarised the circumstances of the collision in similar terms to the Summary of Prosecution Opening set out earlier in these reasons.[25] Referring to the state of mind of Mr Pierce, the judge correctly observed that, as the applicant was charged with omissions after the collision had occurred, she would not make a finding as to Mr Pierce's state of mind.[26]

40 As to moral culpability, the judge said:

> At the plea hearing you conceded, through your counsel, that you did hear a sound at what would have been the point of impact, and although there may have been room for doubt as to the possible explanation for the sound, it was such as to raise a suspicion, rather than actual knowledge, so that you ought to have known that you had hit a pedestrian.
>
> This gave rise to your obligation to stop and assist, and [defence counsel] submitted on your behalf that good people sometimes do the wrong thing, in what he described as extraordinary and unprecedented circumstances.
>
> …
>
> [Defence counsel] added that given the time and the location of the collision it was not a place to expect pedestrian traffic, with no footpath shown in the photograph in the depositions. It is not reasonable, he submitted, to

23 Citing *Guden v The Queen* (2010) 28 VR 288, 294–5 [25]–[27] (Maxwell P, Bongiorno JA and Beach AJA); [2010] VSCA 196; *Loftus v The Queen* [2019] VSCA 24, [79] (Whelan AP and Niall JA); *Hague v The Queen* (2002) 98 MVR 503, 514 [31]–[32] (T Forrest and Walker JJA); [2022] VSCA 17.

24 *Loftus v The Queen* [2019] VSCA 24, [81] (Whelan AP and Niall JA).

25 Reasons, [5]–[33].

26 Ibid [34]–[38].

expect you to know that someone would be walking on the road where Mr Pierce was, and so I should conclude that your state of mind was short of actual knowledge.

The contrary position submitted by [the prosecutor], was that the sound and observable damage to the car should have alerted you to the need to stop, on suspicion, such that you ought to have known that you had hit a person.

My conclusion is that the sound you heard was enough to have alerted you to the high possibility that you had hit a person, and should have stopped.[27]

41 This conclusion is undoubtedly correct.

42 The judge then went on to say:

Nevertheless, your culpability is somewhat reduced by the fact that your driving did not warrant any criticism, and in that sense you did not contribute to the death of Mr Pierce.

The question arises as to whether your culpability in leaving the scene is increased by the deception of the insurance company, that is, whether the deception and the attempt are aggravating features in regard to Charges 1 and 2. The deception behaviour brings the charges of failing to stop and assist into sharper focus, and if they had not been charged separately those actions could arguably have been treated as aggravating factors. But by the time you decided to deceive the insurance company, the first two offences had already been completed, so according to that logic aggravation cannot apply.[28]

43 Again, these conclusions are undoubtedly correct.

44 The judge then considered the VISs. Her Honour stated:

Victim impact statements were provided by several people close to Mr Pierce.

His wife, Tidarat (Kati) Yaworn described her sadness and how much she misses her husband, who was a gentleman, friendly and generous to everyone. She relied on him to help her with understanding and speaking English, and in looking after their 4 year old son, who has a disability. She is now dependent on other people to help her with practical things. With no previous experience she now has the responsibility of managing the business he used to run, and she worries about the future. She is now in somewhat straitened circumstances financially, which was not the case when her husband was alive.

She has nightmares about the way he died and grieves about not having been able to say goodbye to him.

Her psychologist reports that the trauma and loss will have long-lasting

27 Reasons, [39]–[43].
28 Ibid [44]–[45].

psychological effects on her and her ability to function.

Andrew Pierce, the brother of Mr Pierce, states that he lives interstate and was not close to his brother for many years, but this had changed more recently and they had developed a close relationship. He had the task of informing his mother of the death of her son, and he continues to console her. He was particularly angry that his brother was left fatally injured by the side of the road, and that you then tried to cover it up. He made the valid point that your failure to stop meant that other people had to be the first on the scene, and have that traumatic experience, which you avoided.

Mr Pierce's daughter Tayla, who is 17, described her grief at losing her father, and not having him there for important milestones in her life. It had an immediate effect upon her efforts towards her Year 12 studies, with loss of motivation and reduced attendance at school, and the risk of failure when previously she was excelling. She has found the tragedy overwhelming.

Ms Jamie Pierce is Mr Pierce's former wife. In her statement, which she read aloud to the Court, she described the grief felt by her children, her parents and herself, at having lost such an important person in their lives. She struggles with sleeping problems, and increased stress and anxiety. She endures the pain at seeing her children grieve for their father and struggle with their emotions. Ms Pierce and her son Hayden still had strong connections with the business run by Mr Peirce, and this has ended.

Victim impact statements, in general, serve to inform the court and the community of the impact of a tragic death upon those close to the deceased. In this case Mr Pierce's family members have performed that service movingly and eloquently.

At the same time I am conscious of the need to not allow other sentencing requirements to be overwhelmed by these moving expressions of grief.[29]

45 The judge then set out the applicant's personal circumstances,[30] which are reflective of the applicant's plea submissions, as set out at paras [10] to [15] and [21] to [23] of these reasons.

46 The judge took into account the opinion of the applicant's psychologist as follows:

Your psychologist, Ms Barbar Lach, has reported that you have attended 7 psychology sessions, in which you have demonstrated empathy towards Mr Pierce, and that you are acutely aware of the seriousness of your current situation. You have symptoms of Panic Disorder and Adjustment Disorder, with anxiety and mood symptoms, with the possibility of further deterioration into a Major Depressive Disorder and Post Traumatic Stress Disorder.

Ms Lach reported that you have stopped driving, and you and your wife have become quite isolated, as you have been affected by judgment and

29 Reasons, [46]–[54].
30 Reasons, [55]–[69].

> stigma coming from some members of your religious and cultural community.[31]

47 The judge took into account the applicant's early plea, its utility and the fact that she considered that it evidences remorse and acceptance of responsibility.[32]

48 Her Honour considered that that the applicant has very good prospects for rehabilitation and thought it unlikely that he would reoffend.[33] This, her Honour noted, 'leaves little role to be played by the need for specific deterrence in this case, but general deterrence is very important, together with just punishment and denunciation'.[34] The judge took into account 'the possibility of [his] deportation which [would] weigh heavily upon [him] in custody'.[35]

49 The judge referred to a number of case referred to on the plea,[36] and concluded that '[e]ach case is different and the high level of culpability in knowing that you should have stopped does warrant a term of imprisonment, but it shall be combined with a [CCO]'.[37] The judge spent some little time examining the circumstances of *Chhatre*.[38] We shall return to this case later in these reasons.

This application

Proposed ground 1

50 The substance of proposed ground 1 was that a plain reading of the reasons for sentence reveals that the judge incorrectly took into account the impact on the victims of the death of Mr. Pierce. The applicant was not responsible for Mr Pierce's death; the responsibility for his actions was confined to the distress and grief caused by leaving the accident scene, failing to render assistance and concealing his criminality by making false claims to his insurer.

51 The respondent contended that 'the fact that the vehicle that [the applicant] was driving was involved in an accident that resulted in the death of the deceased was part of the language of the relevant charges.' The obligation to stop and render assistance only arose after the accident, however, there was 'nothing improper in the victims referring to the death of the deceased and its impact upon them in their victim impact statements'.

Consideration

52 Section 5(2)(daa) of the *Sentencing Act 1991* (the 'Act') enables a sentencing court to take into account 'the impact of the offence on any victim of the offence'. Further, pursuant to s 5(2)(db), in sentencing an offender the court 'must have regard to … any injury, loss or damage resulting directly from the offence'.

31 Reasons, [68]–[69].
32 Reasons, [71]–[72].
33 Ibid [73].
34 Ibid [74].
35 Ibid [75].
36 See discussion of *Neskovski v The Queen* (2022) 100 MVR 12; [2022] VSCA 86; *Vasilevski v The Queen* (2018) 83 MVR 351; [2018] VSCA 7; and *DPP v Chhatre* (2014) 69 MVR 1; [2014] VSCA 280 at Reasons [77]–[84].
37 Reasons, [85].
38 (2014) 69 MVR 1; [2014] VSCA 280. See Reasons, [81]–[84].

53 Section 8K(1) of the Act provides that a victim of an offence may make a VIS 'for the purpose of assisting the court in determining sentence'. Section 8L(1) provides that a VIS may contain 'particulars of the impact of the offence on the victim and of any injury, loss or damage suffered by the victim as a direct result of the offence'.

54 Section 8L(3) enables a court to rule as inadmissible the whole or any part of a VIS, including the whole or any part of a medical report attached to it. Further, the court may receive the whole of a VIS despite an objection being taken to the statement or part of it, or despite the statement containing inadmissible material (s 8L(5)).

55 In sentencing an offender, the court need not specify which of the material is not relied upon (s8L(6)(b)), but must not rely on material that the court considers inadmissible (s 8L(6)(a)).

56 In our view, it is apparent from the legislation summarised above that a VIS is relevant to sentence only to the extent that it relates to the impact on the victim of the offence for which the accused stands to be sentenced. In *Berichon v The Queen*,[39] Redlich JA considered the meaning of the phrase 'direct result', albeit in a slightly different context. In that case, Berichon pleaded guilty inter alia to one charge of conspiracy to cause serious injury. He conspired with others to drive to a nominated address, and enter and assault an individual residing there. Four of the co-conspirators, including Berichon, were arrested near the nominated address. Thus the choate offence was frustrated. Three VISs were tendered on the plea by residents of the home the subject of the proposed home invasion. Berichon appealed on the basis that the sentencing judge took into account the impact upon those residents when they were, in fact, not 'victims' of the applicant's offending. In considering the meaning of 'direct result', Redlich JA (who agreed with Robson AJA) stated a person will not be a victim unless the effects of the crime on that person are a 'direct result' of the offending. 'The inclusion of the word "directly" obliges the court to give the word due meaning'.[40] The phrase 'direct result' used in ss 3 and 85 (of the *Crimes Compensation Act 1972* (Cth)) and s 5(db) of the Act all bear the same meaning. 'The connection between offence and consequences need not be proximate or immediate. There may be intervening steps'.[41]

57 It is plain, whether this connection be proximate or otherwise, that there must be some connection between offence and consequence for there to be a 'direct result'.[42]

58 In this application, we are unable to discern any connection between the conduct that gave rise to charges 1, 2, 3 and 4 and the death of Mr Pierce. As tragic as it undoubtedly is for his family, Mr Pierce's death was not caused by any aspect of the applicant's driving. To the extent that the applicant's subsequent conduct in failing to stop and to render assistance, leaving the scene and dishonestly endeavouring to conceal his involvement, caused distress to the victims then of course there is a causal connection to that distress. It follows that we consider that the various expressions of profound grief and loss at Mr Pierce's passing were inadmissible as they were not a result of the offending conduct in any sense- there was certainly no 'direct' connection. This of course does not mean that her Honour could not receive the VISs in this matter in their totality (see s 8L(5)), however her Honour was obliged not to act on the inadmissible portions of the VISs.

59 We have concluded that her Honour did rely on these inadmissible portions of the VISs. Despite observing that the applicant's culpability was 'somewhat reduced by the fact that

39 (2013) 40 VR 490; [2013] VSCA 319.
40 Ibid 494 [14].
41 Ibid 494 [17].
42 See also *York (a pseudonym) v The Queen* [2014] VSCA 224.

[his] driving did not warrant any criticism, and in that sense [he] did not contribute to the death of Mr Pierce',[43] the judge gave the inadmissible portions significant attention in the sentencing remarks.[44] With one exception, the VISs are completely focussed, and movingly so, on the loss of Mr Pierce.

60 Her Honour went on to set out the purposes of VISs – 'to inform the court and the community of the impact of a tragic death upon those close to the deceased'.[45] The judge then said that she was 'conscious of the need to not allow other sentencing requirements to be overwhelmed by these moving expressions of grief'.[46]

61 Although her Honour did not need to specify which of the material was not being relied upon (under s8L(6)(b)), the use of the term, 'overwhelmed,' suggests that the relevant 'expressions of grief' were in fact relied upon, even if they were not predominant considerations. We are thereby satisfied that her Honour took into account, to some extent, the expressions of grief and loss as impacts of the offending conduct. We consider this to be the only sensible conclusion from the emphasised passage above.

62 For the reasons we have expressed, this was a sentencing error. Had the applicant been convicted of any offence related to the manner of his driving (for instance, culpable driving, or dangerous driving causing death, or perhaps even careless driving) then the impacts of grief and loss would have been a result of his driving and available for consideration on sentence. But this is not the case.

63 Proposed ground 1 is established, leave to appeal is granted with respect to it, and the sentencing discretion is reopened.

Proposed ground 2

64 Proposed ground 2 alleges a technical defect in the sentences imposed concerning the individual sentences of imprisonment on each charge, incorporating however an effective aggregate sentence over the four charges in the form of one CCO.

65 It is unnecessary to deal with this ground as the sentencing discretion has been reopened. It is sufficient to observe that it may have been more technically correct to have imposed a CCO on one or other of the two more serious offences, rather than aggregating it, overlaying four individual sentences of imprisonment.

Proposed ground 3

66 Proposed ground 3 alleges manifest excess concerning charges 3 and 4 and on the related summary offence. It is sufficient to say that we agree that the sentences imposed are wholly outside the range of sentences available in the reasonable exercise of the sentencing discretion. This applicant had no prior convictions of any sort, and assembled a good deal of character evidence on the plea. The offending was committed in one telephone call. The amounts involved were modest, the applicant pleaded guilty at the earliest opportunity and his imprisonment is more burdensome arising from the anxiety related to his potential deportation.

43 Reasons, [44].
44 See [44] of these reasons.
45 Reasons, [53].
46 Ibid [54].

67 Given that the applicant stands to be resentenced it is unnecessary to say any more about this ground.

Resentence

68 On the plea, the judge was referred to a number of comparable cases.[47] The common thread that ran through all these cases, save for *Chhatre*, was that the failures to assist were each accompanied by either dangerous or culpable driving. Like the applicant in this case, Chhatre's manner of driving was unexceptional. He drove within the speed limit at night when he struck a significantly intoxicated man in dark clothing on the roadway. He fled the scene, drove to his home and later told lies about his involvement.

69 At first instance, Chhatre was sentenced to a technically defective sentence. The DPP appealed and this Court allowed the appeal and substituted a 2-year CCO and a fine for the original sentence. Whelan JA (with whom Weinberg and Santamaria JJA agreed) stated:

> On the material before the sentencing judge, and before this Court, it seems that the only explanation for the accident is the conduct of the deceased pedestrian in walking up the middle of the road at night in the circumstances in which he did.
>
> Whilst up to the point of collision Mr Chhatre had done nothing wrong, he then did a most reprehensible thing. He did not stop. He did not render assistance. He left the scene and returned home.
>
> The accident was witnessed by bystanders and broken pieces of Mr Chhatre's motor vehicle were left at the scene. Mr Chhatre took steps to prevent discovery of the fact that he had been the driver who had hit the deceased pedestrian. He took his motor vehicle to a friend's place and told him an untrue story as to why it was damaged. He removed damaged parts of his motor vehicle.
>
> Two days after the accident, on Sunday 11 August 2013, he confided to his wife that he had hit a pedestrian who he had not seen because he was dressed in black.[48]

70 Later in the judgment and on the issue of disposition, Whelan JA went on to say:

> These offences were serious. It is a most reprehensible thing to leave an injured pedestrian on the road and to drive away. As is almost invariably the case when an offender flees the scene, it is suggested that the flight was motivated by 'panic'. In my view, as counsel for the appellant submitted, in this case Mr Chhatre made a decision to place his own interests above that of the person with whom he had collided. Typically, however, in cases of this kind the offender has a cogent reason to flee; the offender's driving, intoxication or prior record are usually such that the offender has legitimate reason to be concerned that apprehension will result in serious consequences.
>
> This case is unusual, albeit not unique, in that those features are not

47 See footnotes 8 and 16 above.

48 *Chhatre* (2014) 69 MVR 1, 5 [11]–[14] (Whelan JA, Weinberg JA agreeing at 10 [48] and Santamaria JA agreeing at 10 [49]); [2014] VSCA 280.

present. The case is also unusual because the offender here was, before this incident, a person of truly unblemished character and reputation.

> The authorities relied upon by the prosecution do suggest that, ordinarily, offences of this kind must result in a term of imprisonment, but that is not to say that there can never be a case where a non-custodial disposition is appropriate, and counsel for the appellant accepted that.[49]

71 *Chhatre* was factually very close, but not identical to the present case. Chhatre's dishonest concealment was not as protracted, nor did it involve any further offending. Moreover, by the time it came for resentencing, he had already complied, for some months, with the terms of his original defective sentence. That said, in all other respects, it is virtually indistinguishable from the applicant's position. Both involved:

- Blameless and highly creditable pre-accident character and reputation.
- No suspicion of dangerous or culpable driving.
- No motive to flee other than panic.

72 Whilst no two cases are identical, and comparable cases are only of some assistance, we consider this case, like *Chhatre*, to be 'unusual' and materially different to the large majority of this type of offending.

73 Earlier in these reasons, we referred to the applicant's now complicated visa status. He was entitled to have consideration to two aspects in this regard:

(a) His imprisonment may be more onerous due to the prospect of deportation; and

(b) If he is ultimately deported, he will lose the opportunity to settle permanently in Australia. This constitutes additional non-curial punishment.

74 It is impossible to know whether her Honour's sentence was influenced by the prosecutor's error set out at paras [35] and [36] of these reasons. Whatever be the case, we regard both aspects referred to above as highly relevant to sentence.

75 Taking into account the need for general deterrence, just punishment, and denunciation, all of which require some prominence in the sentencing mix, but balancing them with the unusual aspects of this offending, the applicant's compelling personal circumstances, and his excellent prospects for rehabilitation, we resentence him as follows:

(a) Charge 1 (failing to render assistance after a motor vehicle accident) — 10 months' imprisonment.

(b) Charge 2 (failing to stop after a motor vehicle accident) — 10 months' imprisonment.

(c) Charge 3 (OFAD) — $1000.

(d) Charge 4 (Attempt OFAD) — $200.

(e) Charge 5 (Failure of owner of motor vehicle to give information about driver) — $100.

[49] Ibid 9 [38]–[40] (Whelan JA, Weinberg JA agreeing at 10 [48] and Santamaria JA agreeing at 10 [49]).

76 We make no orders as to cumulation. The total effective sentence is therefore 10 months' imprisonment with fines of $1300. But for the applicant's plea of guilty, we would have sentenced him to 18 months' imprisonment with a non-parole period of 12 months.

77 We grant a stay of 28 days for the payment of the fines.

78 The presentence declaration is 272 days, not including the date of judgment.